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In the Supreme Court of the United States

OCTOBER TERM, 1976

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE
OF CALIFORNIA, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF MARYLAND, ET AL.

COMMONWEALTH OF VIRGINIA EX REL.

STATE AIR POLLUTION CONTROL BOARD, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

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ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DISTRICT OF COLUMBIA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE NINTH, FOURTH AND DISTRICT OF
COLUMBIA CIRCUITS

REPLY BRIEF FOR THE FEDERAL PARTIES

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INDEX

	Page
I. Respondents' constitutional arguments.....	2
II. Respondents' statutory arguments.....	15
III. Respondents' arguments regarding the inspection and maintenance programs.....	19
IV. Respondents' arguments regarding the bus purchase regulation.....	25
Conclusion	28

CITATIONS

Cases:

<i>Case v. Bowles</i> , 327 U.S. 92.....	8
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320.....	11
<i>Clarke, Ex parte</i> , 100 U.S. 399.....	7-8
<i>Cohens v. Virginia</i> , 6 Wheat. 246.....	5, 6
<i>Commonwealth of Pennsylvania v. Environmental Protection Agency</i> , 500 F. 2d 246	17
<i>Environmental Protection Agency v. California ex rel. State Water Resources Control Board</i> , No. 74-1435, decided June 7, 1976.....	13
<i>Fry v. United States</i> , 421 U.S. 542.....	10, 11
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91.....	11, 12
<i>Kansas City, Mo. v. Kansas City, Kan.</i> , 393 F. Supp. 1.....	13
<i>Kentucky v. Dennison</i> , 24 How. 66.....	8
<i>National League of Cities v. Usery</i> , No. 74-878, decided June 24, 1976.....	2, 7-8

II

Cases—Continued

<i>Sanitary District of Chicago v. United States</i> , 266 U.S. 405-----	Page 10, 11
<i>Selective Draft Law Cases</i> , 245 U.S. 366--	9
<i>Siebold, Ex parte</i> , 100 U.S. 371-----	6, 7
<i>State Water Control Board v. Train</i> , 8 E.R.C. 1609-----	13
<i>Testa v. Katt</i> , 330 U.S. 386-----	8
<i>Train v. Natural Resources Defense Council</i> , 421 U.S. 60-----	16, 19
<i>United States v. Douglas County</i> , 5 E.R.C. 1577-----	13
<i>Washington v. General Motors Corp.</i> , 406 U.S. 109-----	12
<i>Wisconsin v. Illinois</i> , 278 U.S. 367-----	15
<i>Wisconsin v. Illinois</i> , 281 U.S. 179-----	15
Constitution, statutes, and regulations:	
United States Constitution:	
Article I, section 3, para. 1 (changed by the seventeenth amendment)----	4
Article I, section 4, para. 1-----	4, 6
Article I, section 10-----	4
Article II, section 1, Clause 2-----	4
Article II, section 2, Clause 1-----	4
Article II, section 2, Clause 2-----	4
Article III, section 2, Clause 2-----	4
Article IV, section 1-----	4
Article IV, section 2-----	4
Article IV, section 3-----	4
Article VI-----	4, 5
Article VI, clause 3-----	5
Thirteenth amendment-----	4
Fourteenth amendment-----	4
Fifteenth amendment-----	4
Seventeenth amendment-----	4

III.

Constitution, statutes, and regulations—Continued

Twenty-fourth amendment-----	Page 4
Twenty-sixth amendment-----	4
Clean Air Act, 81 Stat. 485, as added and amended, 42 U.S.C. 1857 <i>et seq.</i> :	
Section 110(a)(2), 42 U.S.C. 1857c-5	
(a)(2)-----	16, 18
Section 110(a)(2)(B), 42 U.S.C. 1857-	
5(a)(2)(B)-----	16
Section 110(a)(2)(G), 42 U.S.C. 1857-	
5(a)(2)(B)-----	16
Section 110(c), 42 U.S.C. 1857c-5(c)---	16
Section 113(a)(1), 42 U.S.C. 1857c-	
(a)(1)-----	18, 24
Section 113(a)(4), 42 U.S.C. 1857c-	
8(a)(4)-----	24
Section 202, 42 U.S.C. 1857f-1-----	20
Section 206(a)(1), 42 U.S.C. 1857f-	
5(a)(1)-----	20
Section 206(b), 42 U.S.C. 1857f-5(b)-	20
Section 207(c), 42 U.S.C. 1857f-6(c)-	20
Section 209-----	21
Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246-----	26
Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816-----	13
Selective Service Law, 40 Stat. 76-----	8
28 U.S.C. 1331-----	12
Arizona Revised Statutes 36-1773 A-----	23
Oregon Revised Statutes 468.405 (1975 Repl.)-----	23
Rhode Island Public Laws of 1976, Chapter 139 (signed May 26, 1976) (amending Title 31, Chapter 38 of the General	

IV

Constitution, statutes, and regulations—Continued	Page
Laws of Rhode Island)-----	24
40 C.F.R. Part 51, Appendix N-----	22
40 C.F.R. 52.242(f)-----	14
40 C.F.R. 52.2435(e)-----	28
Congressional material:	
116 Cong. Rec. (1970):	
p. 19204-----	17
p. 32903-----	17
p. 42387-----	17
p. 42393-----	17
H.R. Rep. No. 94-1175, 94th Cong., 2d sess.	
(1976) -----	20, 23
S. Rep. No. 91-1196, 91st Cong., 2d sess.	
(1970) -----	17, 20
Miscellaneous:	
Corwin, <i>National-State Cooperation—Its Present Possibilities</i> , 46 Yale L.J. 599	
(1937) -----	5
Crowder, <i>The Spirit of Selective Service</i>	
(1920) -----	9
Farrand, <i>The Records of the Federal Convention of 1787</i> (Vols. 1, 2 and 3)	
(1957) -----	7
<i>Federalist</i> , The, No. 15 (Cooke ed. 1961)---	4
<i>Federalist</i> , The, No. 27 (Cooke ed. 1961)---	5
39 Fed. Reg. 1848-----	26
41 Fed. Reg. 31472-----	20
Friendly, "In Praise of Erie—And of the New Federal Common Law", in <i>Benchmarks</i> (1967)-----	13
Holcombe, <i>The States As Agents of the Nation</i> , 1 Southwestern Political Science Quarterly 307 (1921)-----	9

V

Miscellaneous—Continued

Shutler, <i>Overview of Inspection/Maintenance (I/M)</i> , Proceedings of the Fourth North American Motor Vehicle Emission Control Conference (Nov. 5-7, 1975)---	Page 20, 22
Walsh, <i>The Need for and Benefits of Inspection and Maintenance of In Use Motor Vehicles</i> (Nov. 9, 1976)-----	21, 22, 24
<i>The Writings of Thomas Jefferson</i> (Ford ed. 1894)-----	7

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We first discuss respondents' constitutional arguments and next reply to their statutory contentions. In Part III, we address respondents' assertion that the "programs at issue here will make at best a small contribution to achieving the ambient air quality standards required by the Clean Air Act" (Resp. Brief, p. 14). In Part IV, we explain that the EPA Administrator has decided to withdraw the bus purchase regulations challenged by the Commonwealth of Virginia in Pet. No. 75-1050, and similar regulations for Maryland and the District of Columbia.

I.

RESPONDENTS' CONSTITUTIONAL ARGUMENTS

In our opening brief, we discussed whether under *National League of Cities v. Usery*, No. 74-878, decided June 24, 1976, the regulations challenged here threaten the separate and independent existence of the States. We concluded that they did not because of the absence of any broad interference with State policies; the lack of any substantial impact on State budgets; the need to achieve the essential national goal of reducing air pollution; the fact that this can be done only through national action involving the States as operators of their highways; the carefully limited intrusion into an area (pollution control) that had been left to the States; and the great deference shown to the State's choice of the methods

for achieving air quality, with the EPA Administrator imposing a plan only if the State defaults.

Respondents invite the Court to follow a different path of analysis. They advance the theory that Congress has no authority under the Commerce Clause to require States to comply with federal law because, in regulating commerce among the States, Congress is empowered only to act directly on individuals.¹ On this basis, respondents contend that the air pollution stemming from a State's operation of its highways cannot be considered a burden on interstate commerce (Brief, p. 61); that the federal regulations at issue unconstitutionally invade state sovereignty by forcing the States to control such air pollution (Brief, pp. 61-66); that federal compulsion on the States violates the system of government intended by the Framers of the Constitution (Brief, pp. 66-73); and that the decisions of this Court support the proposition "that the federal government would have the power to act on individuals and not on the states" (Brief, p. 73).

We believe the issues presented here cannot be analyzed on respondents' terms. For the reasons that follow, we disagree with their basic premise and urge the Court to reject it.

"Faced with a compelling need to strengthen the central government," respondents tell the Court (Brief, p. 71), "the framers briefly contemplated and emphatically rejected a solution granting the central government power to exercise coercive power directly against State governments." If this view were ac-

¹ Resp. Brief, pp. 55, 59-61, 64-66, 68-73, 75-78.

curate, it would indeed be remarkable that the Framers' emphatic rejection nowhere manifests itself in the language of the Constitution. One will search that document in vain for any clause, any word indicating that the Framers intended to confer such immunity on the States. To the contrary, a careful reading discloses that the Constitution itself expressly imposes many duties—both negative and positive—on the various institutions of State governments,² duties that in many cases obligate the States to exercise their governmental powers and make expenditures of funds. These are not, one can say with assurance, "mere recommendations, which the States [may] observe or disregard at their option."³

It is true, as respondents emphasize (Brief, pp. 16-17, 66-73), that a major defect of the Articles of Confederation was that no State could be compelled to comply with them and that an important innovation in the Constitution was the conferring of power upon the federal government to bypass the States and act directly on individual citizens. It is not true, however, that the States were thereby relieved of any duty to comply with federal law, as respondents urge

² *E.g.*, Article I, Section 3, Clause 1 (changed by the Seventeenth Amendment); Article I, Section 4, Clause 1; Article I, Section 10; Article II, Section 1, Clause 2; Article II, Section 2, Clause 1; Article III, Section 2, Clause 2; Article IV, Section 1; Article IV, Section 2; Article IV, Section 3; Article VI; see also Amendments Thirteen, Fourteen, Fifteen, Seventeen, Twenty-Four, and Twenty-Six.

³ The quotation is from Hamilton's description of the defects in the Articles of Confederation, *The Federalist* No. 15, p. 93 (Cooke ed. 1961), quoted in respondents' brief, p. 7.

(*id.* at 70-73). That would have merely repeated the mistake of those who devised the Articles of Confederation. The Framers of the Constitution were not so unmindful of the recent past; they altered the existing structure of the Constitution by obligating the States to abide by federal law and they did this not only through the Supremacy Clause in Article VI, but also by requiring each member of the state legislatures and the executive and judicial officers of the States to be bound by oath or affirmation to support the Constitution (Article VI, Clause 3).⁴ After explaining these provisions, Hamilton concluded in *The Federalist* No. 27: "Thus the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws."⁵ At this point Hamilton dropped a footnote:⁶ "*The sophistry which has been employed to show that this will tend to the destruction of the State Governments will, in its proper place, be fully detected.*"⁷

⁴ See generally Corwin, *National-State Cooperation—Its Present Possibilities*, 46 Yale L.J. 599 (1937).

⁵ *The Federalist* No. 27, p. 175 (Cooke ed. 1961) (emphasis in original).

⁶ *Ibid.* (emphasis in original).

⁷ Quite relevant here is Chief Justice Marshall's statement in regard to *The Federalist*: "These essays having been published, while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they frankly avow that the power objected to is given, and defend it." *Cohens v. Virginia*, 6 Wheat. 264, 418-419.

Nearly a century ago, the Court in *Ex parte Siebold*, 100 U.S. 371, 392, held in regard to our federal system of government: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."⁸

This merely echoed Mr. Chief Justice Marshall's statement for the Court in *Cohens v. Virginia*, 6 Wheat. 264, 414, that

America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people declared, that in the exercise of all powers given for these objects, it is supreme. It can then, in

⁸ In *Ex parte Siebold*, *supra*, the Court upheld Congress' power, under Article I, Section 4, Clause 1 of the Constitution to impose duties on state election officials holding a congressional election and to prescribe penalties designed to compel compliance.

⁹ The Court added that "if we allow ourselves to regard [the national government] as a hostile organization, opposed to the proper sovereignty and dignity of State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority." 100 U.S. at 394.

effecting these objects, legitimately control all individuals or governments within the American territory. * * * These states are constituent parts of the United States; they are members of one great empire—for some purposes sovereign, for some purposes subordinate.

Respondents' theory that the federal government must act "directly on individuals" or not at all (Brief, pp. 61, 73)¹⁰ cannot be reconciled with *Ex parte Siebold*, *supra*.¹¹ It is a theory that was not relied upon or suggested by the Court's opinion in *National*

¹⁰ Respondents think it significant that the Philadelphia Convention did not adopt two clauses of the Sixth Virginia Resolution, set forth at Resp. Brief 68, which allowed the national legislature (1) to negative State laws violating the Constitution and (2) to call forth the "force of the Union" against any State failing to fulfill its duty under the Constitution.

But the power of the negative was thought unnecessary in light of the Supremacy Clause and was defeated on that basis. 2 Farrand, *The Records of the Federal Convention of 1787* 21-22, 27-28 (1937).

Consideration of the clause regarding the use of force against a State was, on Madison's motion, deferred early in the Convention and not acted upon thereafter. 1 Farrand, *supra*, at 54. But this proves nothing. As Madison later observed (3 Farrand, *supra*, at 528), Jefferson had pointed out that the power was in any event implied and "Compulsion was never * * * more safe than in the hands of Congress which has always shown that it would wait, as it ought to do, to the last extremities before it would execute any of its powers which are disagreeable." Jefferson to Edward Carrington, August 4, 1787, in 4 *The Writings of Thomas Jefferson* 424 (Ford ed. 1894). Moreover, Madison further noted that the clause was in part intended "as a substitute for, or as a supplement to the ordinary mode of enforcing the laws by Civil process * * *." 3 Farrand, *supra*, at 528.

¹¹ In fact, respondents' arguments in this case are strikingly similar to those of Mr. Justice Field, dissenting in *Ex parte Siebold*, *supra*, 100 U.S. at 399, and the companion case of *Ex parte*

League of Cities v. Usery, No. 74-878, decided June 24, 1976. And it is a theory that cannot stand in the face of the numerous decisions of this Court sustaining federal legislation under the Commerce Clause that required state compliance. Many such decisions are cited in our opening brief (pp. 47 n. 49, 52, 53 n. 61) and in respondents' brief (at p. 58 n. 89).¹²

Clarke, 100 U.S. 399, 404-422, arguments the Court rejected in both cases.

The broad language in the Court's opinion in *Kentucky v. Dennison*, 24 How. 66, 107-110, quoted by respondents (Brief, at 75-76), must be read in light of the unique setting of that case, which was decided on the eve of the Civil War and involved an attempt by Kentucky to compel the Governor of Ohio to deliver a fugitive, who was charged in Kentucky with enticing a slave to leave his master. Regardless of the extent of the continuing vitality of the decision in the field of extradition, it has not been applied more broadly. *Ex parte Siebold* did not adopt it, although the dissenting opinion in the *Siebold* case relied heavily on language from the *Dennison* opinion. See also *Testa v. Katt*, 330 U.S. 386, and the other decisions we discuss herein sustaining federal laws that imposed duties on the States and their officials.

¹² Mr. Justice Black, writing for the Court in *Case v. Bowles*, 327 U.S. 92, 101, specifically rejected the argument, based on the Tenth Amendment, "that there is a doctrine implied in the Federal Constitution that 'the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'"

Indeed, the first Selective Service Law, 40 Stat. 76, 80-81, authorized the President to "utilize the service of any or all departments and any or all officers or agents * * * of the several States, Territories, and the District of Columbia." The failure of any person so appointed fully to perform any duty required of him was punishable as a misdemeanor on conviction in any federal district court. Registration for the draft took place at local polling places, under state, not federal control; thus state officials, with federal supervision, were responsible for the initial implementa-

In seeking to explain those Commerce Clause decisions, respondents adopt a different theory. They say that in those cases "the state activity subject to direct regulation was identical to economic activity carried on by private persons or enterprises" (*id.* at 58); on the other hand, the subject of the federal law here is highways and "[o]nly governments own and operate public highways" (*id.* at 60; footnote omitted). Why any of this should make a constitutional difference respondents do not explain. To be sure, only governments own public highways; but only state and local governments own municipal incinerators, police cars, public railroads and penal institutions, all of which respondents concede must comply with various federal laws, including the Clean Air Act (Resp. Brief at 34, 38 n. 61, 58-59). Moreover, if a State, for example, barred private trash burning and required all incinerators to be state-owned, there would be no private activity identical to the State's. Yet, we can conceive of no reasons—and respondents offer none—why on that basis such incinerators should suddenly become immune from federal air quality regulations. On the other hand, respondents surely cannot be proposing an historical test, under which those activities carried on by state governments in 1787 would be exempt from federal laws regulating interstate

tion of the federal statute. See Crowder, *The Spirit of Selective Service* 119-122 (1920); Holcombe, *The States as Agents of the Nation*, 1 *Southwestern Political Science Quarterly* 307 (1921). This Court summarily rejected the argument that the Constitution prohibited requiring state officials to administer the federal statute. *Selective Draft Law Cases*, 245 U.S. 366, 373, 389.

commerce. As we have pointed out (Brief, p. 55 n. 65) and as the intervenors discuss,¹³ most roads were privately owned and managed in the early history of our country.

In any event, respondents' public-private distinction conflicts with *Fry v. United States*, 421 U.S. 542, which upheld the Economic Stabilization Act of 1970 as applied to state employees engaged in a wide range of activities that are in no wise identical to activities in the private sector. Still further, their theories are contrary to *Sanitary District of Chicago v. United States*, 266 U.S. 405,¹⁴ in which the Attorney General of the United States sued to enjoin the Sanitary District of Chicago from diverting water from Lake Michigan in violation of federal law. Mr. Justice Holmes, speaking for a unanimous Court, answered the Sanitary District's argument that the diversion, which was pursuant to a state statute and a means of disposing of Chicago's sewage, was needed to protect public health (266 U.S. at 426):

The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants. In matters where the States may act the action of Congress overrides what they have done.

The *Sanitary District* decision—which respondents do not cite—is significant for a number of reasons.

¹³ Brief for Washington Area Bicyclist Ass'n, *et al.*, in No. 75-1055, at 20-25.

¹⁴ Discussed in our opening brief, at p. 53 n. 61.

At issue was sewage disposal, which might be deemed an "essential" state function. Sewer systems are state owned and operated; there is no identical private activity. The State itself does not create sewage; the private sector does; but the State is nevertheless responsible for the pollution generated. Moreover, the *Sanitary District* decision required the state agency to comply with federal law, thereby placing a mandatory duty on state officers. In fulfilling that duty, the state agency was required to alter the system of waste disposal; and that would doubtless require the expenditure of funds¹⁵ or, as respondents put it, alteration of the State's "operating budget * * * which establishes priorities and programs through the appropriation of funds" (Resp. Brief, p. 24).¹⁶ See note 23, *infra*.

Illinois v. City of Milwaukee, 406 U.S. 91,¹⁷ is also

¹⁵ See 266 U.S. at 425, 431. The City of Chicago had argued that "it is threatened with the loss of a hundred million dollars." *Id.* at 431.

¹⁶ Respondents say we have cited no case to support the proposition that a federal official can "confer upon state agencies or officials powers which the state legislature has not granted, and then require those state officials to exercise those powers under threat of criminal and civil sanctions" (Brief at 24). *Sanitary District* is such a case; the federal official was the Secretary of War; the state officials were required to regulate their diversion of water in a manner contrary to that required by state law; and they were subject to civil suits and criminal liability for their failure to comply. See also, *e.g.*, *Ex parte Siebold*, *supra*; *Fry v. United States*, 421 U.S. 542; *cf.* *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, in which the Court recognized that Congress, acting under the Commerce Clause, could confer additional authority on state or municipal officials.

¹⁷ See our opening brief, p. 26.

on point, despite respondents' claim to the contrary (Resp. Brief, at 43-44). In denying the State of Illinois leave to file a bill of complaint under the Court's original jurisdiction, the Court held, unanimously, that the State could sue in the federal district court, "whose powers are adequate to resolve the issues." 406 U.S. at 108. The State's suit was against four Wisconsin cities and two local sewage commissions who allegedly discharged 200 million gallons of inadequately treated sewage each day into Lake Michigan. The Court held that the case was within the district court's general federal question jurisdiction (28 U.S.C. 1331) because, in the absence of federal legislation on point, federal common law imposed duties on States and municipalities with respect to water pollution. 406 U.S. at 103-108.¹⁹

This is still another instance where the Court recognized that state and local governments may be subject to mandatory federal requirements even in the exercise of what might be deemed "essential" state functions. To be sure, in *Illinois v. City of Milwaukee* the federal duties were to be developed by the judiciary's creating federal common law and exercising traditional equitable powers. 406 U.S. at 108. But the decision speaks also to congressional authority because the federal judiciary may fashion such common law only in regard to matters that are within Congress' power to regulate; in this regard, the federal judicial power

¹⁹ In dictum, the Court also indicated that such federal common law would control air in its "ambient or interstate aspects." 406 U.S. at 103. See *Washington v. General Motors Corp.*, 406 U.S. 109, 114-116.

is no greater than the legislative power.²⁰ Indeed, the Court noted that federal legislation could preempt the field (406 U.S. at 107), and such legislation was enacted shortly after the decision.²⁰

If one State is entitled under federal common law to injunctive relief forcing another State and its municipalities to clean up the pollution for which they are responsible, *a fortiori* Congress has the constitutional authority to impose such duties on state instrumentalities in order to protect the people of the entire nation. This is peculiarly an area in which national action is demanded. And there is no practical method of avoiding federal action directly on a State when, as here, the State itself bears responsibility for contamination of the air through the use of its roads and highways. Respondents say this is federal compulsion on the States. We do not deny it. The law imposes a duty and it has a sanction. But it is not for that reason unconstitutional, as we have sought to demonstrate.

Respondents advance two further constitutional objections that warrant a reply. First, they insist that the EPA Administrator has directed the States

¹⁹ As has been pointed out, it would be intolerable if the federal courts could create "common law" that was not subject to congressional revision. See Friendly, "In Praise of Erie—And of the New Federal Common Law," in *Benchmarks* 167-170 (1967).

²⁰ See the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816; *Environmental Protection Agency v. California ex rel. State Water Resource Control Board*, No. 74-1435, decided June 7, 1976, in which the Court pointed out that under the new law "all dischargers in the State are subject to a permit program developed and carried out by the EPA." Slip op. 14. See *United States v. Douglas County*, 5 E.R.C. 1577 (D. Nev.); cf. *Kansas City, Mo. v. Kansas City, Kan.*, 393 F. Supp. 1 (W.D. Mo.); *State Water Control Board v. Train*, 8 E.R.C. 1609 (E.D. Va.).

to legislate.²¹ We stated in our opening brief that this is not a correct interpretation of the regulations (pp. 20 n. 14, 54). Respondents say this is a change of position. It is not.²²

Second, respondents contend that even if the regulations do not direct them to legislate, in order to comply they will nevertheless have to legislate, at least to the extent of appropriating the necessary funds (Resp. Brief, at p. 24). But this in itself is not a valid constitutional complaint. It is of no particular significance whether States choose to implement the required measures by enacting legislation, by adopting regulations, by issuing administrative directives

²¹ Resp. Brief, pp. 17-18, 23-26, 54-55, 57, 72.

²² The regulations do not themselves require the States to enact legislation. Rather, they assume that the States might view legislation as necessary or desirable, notwithstanding the Administrator's conclusion that "the Clean Air Act and these regulations can provide the legal basis for [state or local] programs" in the absence of state authority (A. 437). The regulations thus called for the submission of legislative proposals for EPA review where legislation was thought to be "needed" or "necessary." See, e.g., 40 C.F.R. 52.242(f) (A. 505) (California). That direction was part of a general requirement that States submit "compliance schedules" (like those for private sources) identifying the timing of actions to be taken to achieve compliance with applicable substantive requirements. Thus, like compliance schedule requirements for private sources, the requirement was intended to assure that incremental actions thought necessary by the source owners (here, the States) would be taken in a timely manner.

Respondents' claim (Brief, p. 18, n. 25) that EPA has changed its position rests on statements in the opinions below that do not accurately reflect EPA's position as presented to those courts. See Pet. No. 75-960, App. 22a-23a (compare EPA brief below in No. 74-1007, at 14-15); Pet. No. 75-909, App. 26a (compare EPA supplemental brief below in No. 73-3306 at 18 and 8, n. 8); Pet. No. 75-1055, App. 17a-18a n. 19 (compare EPA brief below in No. 74-1013 at 23-24).

or simply by acting. As Mr. Justice Holmes held for the Court in *Wisconsin v. Illinois*, 281 U.S. 179, 197, a sequel to the *Sanitary District* case in which Wisconsin sought to compel Illinois to comply with an earlier ruling of the Court,²³ "[i]f its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State." State compliance here may require the expenditure of funds; but that was also true in many of the cases sustaining federal regulations as applied to the States. Indeed, respondents concede that state-owned incinerators must comply with federal emissions standards²⁴ yet the purchase and operation of control equipment for this purpose will doubtless entail substantial expenditures. See *Edelman v. Jordan*, 415 U.S. 651, 668.

II.

RESPONDENTS' STATUTORY ARGUMENTS

While most of respondents' statutory arguments are answered in our opening brief, a number of their contentions warrant a further reply.

²³ See also *Wisconsin v. Illinois*, 278 U.S. 367, in which Mr. Chief Justice Taft, speaking for a unanimous Court, stated (*id.* at 420-421):

"The Sanitary District authorities, relying on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they can not now complain if an immediately heavy burden is placed upon the District because of their attitude and course. The situation requires the District to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the Lake diversion."

²⁴ Resp. Brief, pp. 34, 38-39 n. 61.

Respondents argue that the 1970 Amendments to the Clean Air Act are "merely an extension of prior amendments," allowing greater federal involvement in the effort to control air pollution but representing no marked departure from previous efforts, which sought only to encourage the States to act (Resp. Brief, at 27-28).²⁵ The Court has already rejected this view of Congress' intention. The 1970 Amendments, the Court held in *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64, preserved the principle that the States have the primary responsibility for assuring air quality within their geographic territory. The 1970 Amendments, however, differed significantly from previous legislation regarding air pollution. As Mr. Justice Rehnquist stated for the Court, "[t]he difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility." *Id.* at 64.

As we pointed out in our opening brief (pp. 30-32), when a State fails to promulgate an implementation plan, the Administrator is required by Section 110(c) to promulgate one that meets the requirements of Section 110(a)(2). Two of those requirements are that a plan contain, where necessary, "transportation controls," Section 110(a)(2)(B), and include, to the extent necessary and practicable, a provision "for periodic inspection and testing of motor vehicles," Section 110(a)(2)(G). By any common understanding,

²⁵ See also Resp. Brief, pp. 30, 32, 36-37.

those requirements contemplate controls on the use of roads and automobiles.²⁶ As a practical matter, the most essential type of controls (inspection and maintenance) can only be effectuated by States and localities.²⁷ Thus, it is not surprising that "[t]he legislative history of the Clean Air Amendments of 1970 * * * shows a clear expectation that the states would have to implement significant portions of their transportation control plans * * *." *Commonwealth of Pennsylvania v. Environmental Protection Agency*, 500 F. 2d 246, 258 (C.A. 3).²⁸

²⁶ See, e.g., S. Rep. No. 91-1196, 91st Cong., 2d Sess. 2, 12-14, 31 (1970), quoted in our opening brief, at p. 32 n. 26; and the colloquy between Senators Muskie and Spong during Senate consideration of the Conference Report, 116 Cong. Rec. 42393 (1970).

²⁷ Respondents do not appear to dispute this and, in any event, Congress knew that a national system would not be possible. See, e.g., S. Rep. No. 91-1196, *supra*, at 12-13 ("In considering alternative means of controlling emissions of air pollution agents from used vehicles, the Committee was unable to develop a feasible national system"); *id.* at 31 ("Effective State emission testing and inspection programs will be essential to effective implementation of ambient air quality standards * * *"); 116 Cong. Rec. 19204 (1970) (remarks of Rep. Staggers).

²⁸ See, e.g., H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 3-4 (1970) ("Additionally, the legislation provides that States must require inspection of motor vehicles in actual use" if this is necessary to achieve ambient air quality standards); S. Rep. No. 91-1196, *supra*, at 12-13; 116 Cong. Rec. 32903 (1970) (remarks of Senator Muskie) (meeting air quality standards "is going to require every State Governor and the mayor of every city in this country to impose strict controls on the use of automobiles * * *"); 116 Cong. Rec. 42387 (1970) (remarks of Senator Muskie) (the legislation "will require that urban areas do something about their transportation systems, the movement of used cars, the development of public transit systems * * *").

Respondents say, however, that Congress provided no remedy for a State's refusal to implement transportation control requirements contained in the relevant implementation plan (Brief, pp. 32-49). Their argument apparently is that if a State fails to draft an implementation plan, the remedy is for EPA to draft it; and if a State fails to *enforce* a plan the remedy is for EPA to enforce it; therefore, if a State fails to *comply* with the substantive provisions of a plan requiring affirmative action on its part the remedy is for EPA to take over the actual implementation of those substantive provisions. In other words, according to respondents, a State's refusal to comply with the provision of a plan that requires it to act is not a violation of that plan (Brief 34).

Respondents' basic error is that they equate "enforcement" of the provisions of a plan with "compliance" with the provisions of a plan. But they cannot be equated, because they are quite different concepts with a significant legal and practical distinction. Enforcement is the taking of some action, administrative or judicial, against a violator to compel it to act in accordance with an affirmative duty contained in the plan. Compliance, on the other hand, is the actual undertaking of the affirmative duty. The Act, as we have discussed, requires States to undertake certain affirmative duties, such as inspection of motor vehicles. The Act also authorizes the Administrator to seek judicial enforcement to require State compliance with an affirmative duty. Sections 110(a)(2) and 113(a)(1).

Congress knew through experience that a voluntary program to abate air pollution throughout the States could not work. See *Train v. Natural Resources Defense Council, supra*, 421 U.S. at 63-65. But Congress firmly intended that the air quality standards necessary to protect the citizens of this nation be met. It imposed affirmative duties on the States in order to assure that this would happen. If Congress had further intended to require EPA, upon a State's refusal to act, to deploy armies of federal road maintenance crews, federal mechanics, federal traffic police, and federal registration and licensing officials throughout each such State, Congress surely would have said so. For it is that system of regulation, not the one represented by the position of EPA in these cases, that would, as respondents put it, "stand as an unprecedented exercise of federal power" (Brief, p. 55) and constitute a complete departure from the historic division of responsibilities between the State and national governments in this country.

III.

RESPONDENTS' ARGUMENTS REGARDING THE INSPECTION AND MAINTENANCE PROGRAMS

Respondents assert that the "programs at issue here will make at best a small contribution to achieving the ambient air quality standards required by the Clean Air Act" (Resp. Brief, at p. 14). For the reasons that follow, we disagree.

In urban areas, automobiles account for approximately seventy percent of carbon monoxide emissions

and forty percent of hydrocarbon emissions.²⁹ Without inspection and maintenance programs in the States, EPA has concluded, air quality standards cannot be met. All automobiles in the particular area affected must be tested periodically and those vehicles with emissions over a certain level must have corrective work done on them.

Federal controls on vehicle design and manufacture are not in themselves sufficient.³⁰ Although EPA has authority to order the recall of vehicles that exceed the emission standards in actual use and has in fact required a number of recalls, this authority extends only to vehicles that have been "properly maintained and used" by their owners. Section 207(c).

Over the past few years, EPA has conducted several studies to measure the emissions of automobiles in actual use. Estimates based on the data from these studies indicate that, on average, carbon monoxide and hydrocarbon emissions from 1975 model year vehicles exceed the applicable emission standards the

²⁹ Shutler, *Overview of Inspection/Maintenance (I/M)*, Proceedings of the Fourth North American Motor Vehicle Emission Control Conference 111 (Nov. 5-7, 1975); see H.R. Rep. No. 91-1146, *supra*, at 6; H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 208 (1976).

³⁰ Certification under Section 206(a)(1) of the Clean Air Act requires the testing of prototypes of cars for a new model year to determine whether the design as expressed in the prototype is capable of meeting emission standards prescribed under Section 202. Assembly line testing, which has just been begun under authority of Section 206(b), see 41 Fed. Reg. 31472, determines only whether vehicles coming off the assembly line meet the emission standards.

first year after sale.³¹ Available data indicate that there are two major reasons for this disappointing performance: lack of proper maintenance and deliberate disabling of the emission control system.³²

In 1973, EPA published estimates concluding that total emissions of both hydrocarbons and carbon monoxide could be reduced by between three and

³¹ Walsh, *The Need for and Benefits of Inspection and Maintenance of In Use Motor Vehicles* 4-5 and Figs. 3-5 (Nov. 9, 1976) (internal EPA paper endorsed by the agency and distributed to State and local agencies, as well as to interested members of the public, for comment November 29, 1976) (a copy of which we are lodging with the Clerk of the Court). However, California cars, for which separate standards have been established under authority of Section 209 of the Clean Air Act, have performed considerably better. *Id.* at 6 and Fig. 8.

³² With respect to 1973 vehicles with approximately 15,000 accumulated miles carbon monoxide levels for normally maintained cars are more than 40 percent greater than for those maintained and tuned according to manufacturers' specifications; hydrocarbon levels are about a third higher. Walsh, *supra*, at 5, Figs. 6 and 7. For 1975 vehicles, parallel studies have not been done. However, a sample of "normally maintained" 1975 cars with an average of about 8,000 miles accumulated has been examined. This sample was divided into those cars on which the engine idle CO setting was properly adjusted and those on which it was not. Emissions from the second class were 32 percent greater than those from the first for hydrocarbons and almost twice as high for carbon monoxide. *Id.* at 6, Figs. 6 and 7. Indications are that sensitivity of emissions to idle adjustment may be even greater for 1975 models than for cars from earlier model years.

In addition to the effect of lack of proper maintenance, EPA studies have shown that 20 to 25 percent of 1975 vehicles examined have had emission controls removed or rendered inoperative within one year of initial purchase. *Ibid.* According to EPA studies on cars from earlier model years, "tampering" of this nature increases with vehicle age beyond the first year. *Id.* at 7.

fifteen percent through an inspection and maintenance program.³³ In light of the new information discussed above, EPA is now revising these estimates. A draft of the revised estimates has been provided to EPA regional offices and to selected State and local officials for comment. Although the process of revision is thus in its early stages, and the benefits to be derived from any specific inspection and maintenance program will in any event depend heavily on its individual design and implementation, it is reasonable to predict the potential reduction in emissions as a result of inspection and maintenance will be ultimately listed as approximately 25 to 30 percent for both hydrocarbons and carbon monoxide.³⁴ Since, as we previously noted, automobiles account for approximately seventy percent of carbon monoxide emissions and approximately forty percent of hydrocarbon emissions in polluted urban areas,³⁵ hydrocarbon emissions could be reduced by about ten to twelve percent in such an urban area, and carbon monoxide emissions by about eighteen to twenty percent, through an inspection and maintenance program applicable to automobiles alone.³⁶ In short, the available

³³ 40 C.F.R. Part 51, Appendix N.

³⁴ Walsh, *supra*, at 18-19.

³⁵ About an additional 20 percent of total emissions of each of these pollutants is accounted for by mobile sources other than automobiles, such as trucks and motorcycles. These emissions, too, can be reduced by periodic inspection and maintenance. However, no such potential gains have been taken into account in this discussion.

³⁶ See *Shutler*, note 29, *supra*, at 111.

information demonstrates that the nation will not realize anything approaching a full return on its large and continuing investment in emission controls on new automobiles without implementation of inspection and maintenance programs.

As we noted in our opening brief (p. 50), the costs associated with such a significant reduction in air pollution are small. In States with safety inspection programs it is necessary only to add the emissions testing equipment itself. It has been estimated that a modest fee of only a few dollars per vehicle inspected would cover the costs (A. 427).³⁷

Several emissions inspection programs are also in operation in States that do not have safety inspection programs. In Arizona the complete program has been set up through a State contract with a testing firm that acquired the necessary property, constructed the testing facilities, and now operates the program; the major part of the fees collected from motorists (\$5.00 per test) go to cover the contractor's costs, not the State's costs directly. The only direct cost to the State has been the administration of the contract.³⁸ A program in Oregon has also been begun without a safety program as a basis. The per vehicle fee in this program is also \$5.00.³⁹

³⁷ See also H.R. Rep. No. 94-1175, *supra*, at 240.

³⁸ Arizona Revised Statutes 36-1773.A. On January 1, 1977, the State of Arizona's program for the Phoenix-Tucson area became fully mandatory.

³⁹ Oregon Revised Statutes 468.405 (1975 Repl.).

As to the cost of repairing vehicles that fail, limited data is available from surveys conducted by the Oregon, New Jersey, and

A compulsory inspection and maintenance program has been established by the City of Cincinnati, Ohio.⁴⁰ Rhode Island has enacted legislation authorizing a compulsory program to be operated (like the Arizona program) by a private contractor,^{40a} and the work of selecting that contractor is well advanced. (In California, a voluntary pilot inspection program in the Riverside area is in operation.) In other States, efforts

Arizona programs. The New Jersey data show an average repair cost of \$33.00 for the 12 percent of cars that failed, with 65 percent of the repairs costing less than the average. The Oregon data show an average repair cost of \$18.86 for the 35 percent of cars that failed with 79 percent of the repairs costing less than the average. The Arizona data show an average cost of \$25.42 for the 47 percent of cars that failed with 67 percent of the repairs costing less than the average. Walsh, *supra*, at Fig. 11. On the other hand, such repairs will result in an improvement in fuel economy. *Id.* at 21.

⁴⁰ Respondents cite (Brief, p. 12 n. 22) the recent suit in *United States v. Ohio Department of Highway Safety*, S.D. Ohio, No. C-2-76-835. The circumstances surrounding this action are as follows. EPA promulgated a transportation control plan for the State of Ohio which contained the requirement that an inspection and maintenance program be established and operated in the City of Cincinnati. As part of that program, the State was required to deny registration to non-complying vehicles. The plan was not challenged in a petition for review, and the City of Cincinnati is currently operating an inspection and maintenance program. The State, however, refused to comply with the plan. The Agency sent it a notice of violation (Section 113(a)(1)), held a Section 113(a)(4) conference, and finally issued the State an administrative order, all to no avail. Consequently, the United States initiated suit seeking injunctive relief requiring the State to comply with the provisions of the inspection and maintenance program.

^{40a} Chapter 139, Public Laws of 1976 (signed May 26, 1976) (amending Title 31, Chapter 38 of the General Laws of Rhode Island).

along this line are considerably less advanced. EPA believes that the questions raised by these cases regarding the extent of federal authority to compel States to take action have been an important ingredient in this lack of progress.

IV.

RESPONDENTS' ARGUMENTS REGARDING THE BUS PURCHASE REGULATIONS

Respondents argue that the regulations requiring Maryland, Virginia and the District of Columbia to submit statements evidencing financial commitments sufficient to enable the Washington Metropolitan Area Transit Authority (WMATA) to purchase new buses are inconsistent with the WMATA compact and, in any event, are arbitrary or capricious because the purchase of new buses would be ineffective in the absence of strong measures to discourage the use of private vehicles. Upon reconsideration, the EPA Administrator has decided to withdraw the regulations.

These regulations were promulgated three years ago and have, as respondents note, "gone virtually unnoticed in the ensuing years" (Resp. Brief, at 82). In the court of appeals, Maryland and Virginia argued that if they made financial commitments directly to WMATA (as the regulations required, this would violate the WMATA compact (Pet. No. 75-1050, App. 298); the court of appeals disagreed (*ibid.*). Only the Commonwealth of Virginia sought review of that judgment (Pet. No. 75-1050). It argued, as it had

in the court below, that under the terms of the WMATA compact the Commonwealth had no financing responsibility because "on the Virginia side" this was to be done only by local governments and the Northern Virginia Transportation District (Pet. No. 75-1050, p. 12). Our opening brief responded to this argument by noting that Virginia's position was inconsistent with its own transportation plan submitted to EPA for approval, which contemplated the purchase of new buses (Brief, pp. 56-58).

Neither Virginia nor the other affected parties argued in the court of appeals, as they now do for the first time in this Court (Resp. Brief, pp. 83-84), that these regulations would be ineffective as a result of EPA's revocation and Congress' prohibition of certain parking surcharge requirements, which took place long before oral argument below.⁴¹ 39 Fed. Reg. 1848; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246.

Now that respondents have raised the question, however, the EPA Administrator has reconsidered the technical basis for the regulations and concluded that they are no longer appropriate in the circum-

⁴¹ The District of Columbia alluded briefly to the problem (Brief in No. 74-1013 below, at 32-33) but only as part of its argument that the entire plan for the National Capital Interstate Air Quality Control Region should be remanded to EPA for promulgation of a comprehensive plan for the area (*id.* at 25-34). Although certain regulations were challenged as arbitrary or capricious, the bus-purchase regulations were not among them. *Id.* at 34-46.

stances that prevail. Without parking surcharges or other provisions that will discourage the use of private vehicles, bus purchases will be less effective than originally contemplated. In addition, the advent of subway service in the area may decrease the demand for bus service to some extent, even if other factors induce people to abandon their automobiles.⁴² Finally, EPA promulgated such regulations only for the National Capital Metropolitan Area, and did so there primarily because the States had proposed bus purchases in their plans.⁴³ Now that they have withdrawn their support for the idea, reliance on their original intentions is clearly misplaced.⁴⁴ For these reasons, the EPA Administrator has concluded that the regulations should be revoked and will publish notice of

⁴² Bus purchases and other mass transit improvements are in themselves incentives to patronage of mass transit, and some measures other than parking surcharges (*e.g.*, exclusive bus lanes) can discourage the use of private vehicles.

⁴³ See, *e.g.*, A. 596, 606. By the time the bus purchase regulations were promulgated, WMATA had also become committed to expanding its bus fleet as quickly as possible (*id.* at 598, 606), and Virginia had agreed to the feasibility of purchasing 750 buses (or, by implication, the lesser number specified in EPA's regulations) (*id.* at 906).

⁴⁴ Although the intent of the regulations is clearly to increase the size of the bus fleet serving the area, they do not explicitly preclude the selling of old buses, as is apparently WMATA's current plan. Resp. Brief, p. 82. In addition, there is no explicit requirement for the use of the new buses to be purchased. Cf. *ibid.* Accordingly, even strict enforcement of the bus purchase regulations would not necessarily achieve the objective of fleet expansion.

their revocation in the Federal Register as rapidly as possible.

However, we should note—as respondents candidly point out—that WMATA has sought a federal grant to finance 80 percent of the cost of 300 new buses to be acquired during fiscal years 1976 and 1977 (Resp. Brief, p. 82). This is precisely the same number of new buses for fiscal years 1976 and 1977 mentioned in the regulations respondents here challenge (see, *e.g.*, 40 C.F.R. 52.2435(e), set forth in our opening brief, at p. 57 n. 66).

CONCLUSION

For the foregoing reasons and those contained in our opening brief, the judgments of the Courts of Appeals for the Ninth and Fourth Circuits should be reversed, and the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed insofar as it prohibits the Administrator from requiring a State to implement necessary transporta-

tion control measures, and sustains the regulations requiring the purchase of additional buses, and affirmed in all other respects.

Respectfully submitted.

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